

MORE FUNDS FOR PAYCHECK PROTECTION PROGRAM, MORE UNCERTAINTY FOR BUSINESSES

Hodgson Russ Banking & Finance Alert
April 24, 2020

On April 24, President Trump signed into law new legislation that provided an additional \$310 billion in funding for the Paycheck Protection Program (PPP). Now effective, banks should again begin accepting applications for the program. While the additional funding may bring hope to some businesses who were left out of the first tranche of PPP funds, guidance released by the Small Business Administration (SBA) and Department of Treasury (Treasury) on April 23 is causing some borrowers to second guess their involvement in the massive program.

PPP Overview

A forgivable loan program administered by the SBA and targeted primarily at businesses with less than 500 employees, the PPP has been plagued by ambiguities in the language of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and related interpretations published by SBA and Treasury. In prior alerts, available [here](#) and [here](#), we have described both the evolving terms and continuing uncertainty associated with the PPP.

The Certification

One of the many issues puzzling applicants is the following certification required on the Paycheck Protection Program (PPP) application: *Current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant.* Neither SBA nor Treasury provided any interpretive guidance on this certification after the CARES Act was signed into law on March 27. That changed on April 23, nearly two weeks *after* banks began accepting applications for the program including this certification.

Media and Political Pressure

Unfortunately, the new guidance appears to be a response to media and political pressure than actually clarifying the ambiguous certification. After the first tranche of funds for the PPP were exhausted, there was significant media attention on large and public companies' acceptance of PPP loans. National politicians entered the fray as well, issuing warnings and statements of intent through social media.

Attorneys

Jessica Chue
Krystal Daniels
Christofer Fattey
Amy Fitch
Andrea Gervais
Valerie Stevens
Brianna Szopinski
James Thoman
Sujata Yalamanchili

Practices & Industries

Banking & Finance
Corporate & Business
Financial Services
Securities Regulation & Corporate Compliance

MORE FUNDS FOR PAYCHECK PROTECTION PROGRAM, MORE UNCERTAINTY FOR BUSINESSES

FAQ #31

The new guidance comes in the form of a new Frequently Asked Question on the Treasury website that introduces substantial uncertainty to the question of whether a business that is otherwise eligible for the program based on the business size standards should apply. The full text of the FAQ is provided here:

31. **Question:** Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.

For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification. Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

More Confusion Results

As mentioned above, PPP applicants are required to certify that *current economic uncertainty makes this loan request necessary to support the ongoing operations of the applicant*. The CARES Act also suspended the customary SBA requirement that borrowers are unable to obtain credit elsewhere. Given the unprecedented nature of the COVID-19 pandemic, and the fact that SBA offered no guidance whatsoever in interpreting this certification, a significant number of small businesses likely felt they could make this certification in good faith.

However, in the new FAQ, the SBA now states that “all borrowers should review carefully the required certification” and “must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”

Public Companies Under Additional Scrutiny?

MORE FUNDS FOR PAYCHECK PROTECTION PROGRAM, MORE UNCERTAINTY FOR BUSINESSES

Note that the FAQ guidance is applicable to all borrowers, without any regard to size or status (public, private, non-profit). But the example given in the FAQ might be a signal that the SBA intends to apply a heightened level of scrutiny to public companies.

Get Out of Jail Free Card?

In what may be seen as an acknowledgment of this confusion (or, perhaps a scare tactic aimed at adding liquidity to the PPP), the FAQ states that any borrower that applied for a PPP loan prior to April 23 and repays the loan in full by May 7 will be deemed by SBA to have made the certification in good faith. This might provide some solace to a business that has already applied for (or received) a PPP loan, to the extent that business is concerned about its ability to make the certification in good faith. But this safe harbor will not benefit a business that has not yet submitted its application.

Borrower Beware

The new “guidance” by SBA creates more questions than answers. It fails to provide any certainty to PPP applicants or recipients on the meaning of the required certification, how to determine whether a business has access to “other sources of liquidity” and what it means to take those other sources “into account”, what types of liquidity are “detrimental” to a business, and what level of loss of business activity or economic injury is sufficient to support the certification in good faith.

PPP borrowers should consider carefully their actual need for these funds, whether available bank financing might provide adequate liquidity, and whether the new guidance might lead them to pay back the loan without seeking forgiveness. While the original guidance supplied for the program indicated that these loans would be available to a wide swathe of businesses, recent statements by SBA and Treasury indicate there are definitely strings attached.

If you are considering applying for a PPP loan, or have received a loan and would like to better understand SBA guidance, please contact Chris Fattey (716.848.1757) or Valerie Stevens (646.218.7614).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

If you received this alert from a third party or from visiting our website, and would like to be added to any of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/subscription-center-hr.html>